No. 82-2072

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

In Re

ALGER HISS,

*Petitioner.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

VICTOR RABINOWITZ, Esq.
30 East 42nd Street
New York, New York 10017
(212) 697-8640
*Attorney for Petitioner*

September 30, 1983

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

**No. 82-2072**

In Re

ALGER HISS,

*Petitioner.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The brief of the United States in opposition to the petition for a writ of *certioari* is tendentious in the extreme, both with respect to its statement of facts and its discussion of the law. We suggest that such an approach in connection with a petition for *certiorari* is not helpful, but we do not have either the space or the time to isolate the many instances in the government's brief in which its case is overstated. We shall confine ourselves instead to a brief reply to the principal points made in the brief in opposition.

1. The government persists in misunderstanding petitioner's principal point relating to the typewriter, Ex. UUU, although we had thought we had made this clear in our petition for a writ of *certiorari,* as well as in our briefs in the district court and the Court of Appeals. The offense of the government resulting in a violation of petitioner's right to a fair trial consisted not merely, or even principally in its concealment of the doubts it had concerning the authenticity of the Woodstock typewriter. The government argued below that the typewriter was irrelevant, and the district court so found. (542 F. Supp.

996) Had the prosecution refrained from mention of the typewriter, its protestations might be given some weight. But it did not remain silent as to Exhibit UUU. It adopted the typewriter as its own and relied heavily on its authenticity without disclosing either to the court or the petitioner the substantial evidence in the files to the contrary. Thus, we have repeatedly called attention to Murphy's heavy emphasis on the typewriter in his closing. See Petition for Certiorari, pp. 11-16, and particularly fn. 15 at p. 12. Not only did Murphy assume the authenticity of the typewriter, despite the doubts the government had, but the trial court, in charging the jury, similarly placed heavy emphasis on the typewriter and assumed its authenticity. See Petition, p. 12.[1] No reference to petitioner's argument in this respect is made by the government in its brief in opposition.

Admittedly, this is an unusual case. It is not common that a defendant in a criminal action offers an exhibit which the prosecution knows to be of doubtful authenticity, but which it enthusiastically endorses because it turns out to be fatal to the defense. Had the government offered the typewriter in evidence while concealing its doubts, no one would deny that it was acting in bad faith and that petitioner's constitutional rights were being violated. The fact that the petitioner offered the exhibit in ignorance of the material in the FBI files cannot operate to deny petitioner his right to a fair trial. It must be kept in mind that the typewriter was central to the prosecution's case *as it was presented to the jury.* The government's post-trial efforts to minimize the exhibit cannot change what happened at the trial, and what was said to the jury by Murphy and the court.

---

1 Of course, we cannot assign as error the trial court's charge to the jury. It did not know any more than did petitioner, that the government's files cast grave doubts on the authenticity of Ex. UUU. The court assumed its authenticity as did petitioner. Only the government had reason to question it.

We believe the evidence presented in this proceeding does more than cast doubt on the authenticity of the typewriter; it compels a finding that the typewriter offered at the trial was not the Hiss typewriter at all. But even if the government is correct and even if the prosecution merely had doubts as to its authenticity (and the record clearly shows such doubts), the result is the same. The prosecution cannot hide behind the fact that the typewriter was discovered and introduced into evidence by Hiss. Its duty certainly arises above such mechanical and legalistic reasoning.[2]

2. In discussing petitioner's contention that the FBI and the prosecution made repeated incursions into the defense camp and, indeed, sought information from defendant's investigators, the government refers only to the activities of Schmahl and states that Schmahl's contacts with the FBI occurred only during the first trial.

Even if this were an accurate statement of the record, it would not excuse the government in its continuing confidential communications with Schmahl, but it is not accurate. In the first place, Schmahl was interviewed by Murphy on June 5 and 6, 1949 (2 days before the verdict in the first trial) and provided information for him which he used in cross-examination of Hiss and Mrs. Hiss at the second trial, and which he used in his closing argument in the second trial (see Petition for Certiorari, pp. 17-18). Further, Schmahl again provided information to the FBI concerning interviews between himself and Hiss after the second trial and while the motion for a new trial was in preparation (see Petition for Certiorari, p. 18).

The government in its response to the Petition for Certiorari ignores still other contacts between Hiss' experts and the FBI. Raymond Schindler and Robert C. Goldblatt were both inter-

---

2 As we have noted elsewhere, Hiss' production of the typewriter is inexplicable except on the assumption that he thought it would prove him not guilty. That assumption was mistaken—if the typewriter was authentic.

viewed by the FBI and supplied information relevant to the preparation for a new trial. The FBI invited Schindler to return with further information and actually solicited information from Goldblatt.

The full extent of these communications were not disclosed by the information turned over as a result of the FOIA proceedings, nor can we know whether there were not many other instances of the same character. In the absence of further disclosure, petitioner cannot detail the full effect the FBI's activity had on the second trial and on the motion for a new trial. This is one of the reasons petitioner seeks an evidentiary hearing. In the very nature of things, the extent to which the government utilized the information supplied by Schmahl, Schindler and Goldblatt, and perhaps others, cannot be ascertained without an opportunity for a hearing unless this Court is prepared to apply a *per se* rule in this case. It makes little sense to require petitioner to prove prejudice while denying to him the means of meeting that requirement. See cases cited at p. 27 of the Petition for Certiorari.

3. Petitioner further argues that pre-trial statements made by Chambers were improperly withheld. The government states categorically that counsel for Hiss did not demand production of two of the statements and that concealment of the third statement was non-prejudicial (Brief in Opposition, p. 17). The facts with respect to the petitioner's demands were summarized in the Petition for Certiorari at pp. 21-23. This explanation is completely ignored by the government in its brief.

The government further contends that, in any event, the material contained in the withheld statements would not have been helpful to the petitioner, either because they were cumulative of other statements that were produced, or because the information provided by those statements was not admissible. But it is not for the prosecution to determine whether the material which a defendant requests is or is not material to the defense. Nor is the judgment of an appellate court decisive. A defendant is entitled to a trial by jury, not by an appellant

court. The judgment of what evidence a defendant deems relevant can be made only by defendant's counsel; its admissibility can be best determined by the trial court which is familiar with the evidence offered and can best evaluate, in the context of a trial, the significance of the statements withheld and their admissibility in evidence. To argue many years after the trial that the evidence would not have been of help to the defense, results in the denial to the defendant of his fair trial rights.

This is particularly true of Ex. CN 23 relating to Chambers' homosexual activities. Murphy's questioning of the psychiatric witnesses would not have been possible had the defense been aware of the existence of Ex. CN 23. That cross-examination was not trivial, but addresses itself to essential parts of the psychiatric testimony which occupied a major portion of the trial record and which was discussed by Murphy near the opening of his summation.[3]

4. Petitioner's contention that he is entitled to an evidentiary hearing is not limited to the question of electronic surveillance, but encompasses other areas in dispute as well, such as the significance of the government's intrusion into the defense camp, aspects of the authenticity of the typewriter which are still unrevealed, and related matters.

It is true that petitioner has no evidence of unlawful wiretapping; had such evidence been available it would have been presented. Petitioner has, however, more than a "bare hope" that he will discover such evidence through an evidentiary hearing. As is pointed out in the Petition for Certiorari, p. 28, a wiretap was placed on the Hiss telephone in Washington in 1945 and continued every day thereafter until September, 1947, when Hiss and his family moved to New York City. The documents produced thus far by the New York field office are silent as to whether this surveillance continued in New York, but it is unreasonable to assume that it was discontinued at a

---

3 The district court found that cross-examination of one of the psychiatrists was improper (Petition for Certiorari, p. 27).

time when Hiss' alleged involvement in espionage was the subject of attention by the House Committee on Un-American Activities and finally by the grand jury. That some of records of the surveillance might have been destroyed is not surprising; at the very time Hiss was indicted, the FBI was destroying its files in the *Coplon* case. See Petition for Certiorari, p. 28. It is still possible that there are records either in New York or Washington which will indicate whether there was surveillance, however extensive it was, and the substance of the material acquired thereby, even though the actual logs and details of that surveillance may not be available.

As is noted above at p. 5, the subjects of FBI intrusion into Hiss' preparation for trial and for the new trial are also appropriate subjects for an evidentiary hearing. The facts in the record are highly suspicious and petitioner has never had an opportunity to follow through on the possibility of government misconduct in this area. Evidentiary hearings in connection with an application for a writ of *coram nobis* are by no means unusual. See p. 27 of the Petition of Certiorari.

## CONCLUSION

For the above stated reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

VICTOR RABINOWITZ, ESQ.
RABINOWITZ, BOUDIN, STANDARD,
KRINKSY & LIEBERMAN, P.C.
30 East 42nd Street
New York, New York 10017
(212) 697-8640

*Attorneys for Petitioner-Appellant Alger Hiss*

Dated: New York, New York
September 30, 1983